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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1967.

No. 500

BROTHERHOOD OF RAILROAD TRAINMEN,
Petitioner,

v.

CERTAIN CARRIERS REPRESENTED BY THE EASTERN, WESTERN & SOUTHEASTERN CARRIERS CONFERENCE COMMITTEES, THE MISSOURI PACIFIC RAILROAD COMPANY, NATCHEZ & SOUTHERN RAILWAY COMPANY, THE TEXAS & PACIFIC RAILWAY COMPANY, RALPH T. SEWARD, Chairman of Arbitration Board 282 and the UNITED STATES OF AMERICA, Intervenor,
Respondents.

PETITION

For a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

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INDEX.

	Page
Prayer	1
Opinions below	2
Jurisdiction	2
Questions presented	2
Statutes involved	3
Statement	4
Reasons for Granting the Writ:	
The long existing, extensive and continuing controversy as to the validity of awards by special boards of adjustment which arbitrated part of the "railroad work rules dispute" under P. L. 88-108 as delegatees of the arbitration board created by Congress without complying with the procedures established by P. L. 88-108 for the conduct of the arbitration and whether such awards would, if sustained, deprive petitioner and the railroad employees it represents of contract rights without due process of law should be resolved by this court in view of the vascillating, contradictory and belated opinions and decisions of the courts below, the last of which would, if sustained, preclude a determination of the controversy on its merits contrary to a prior opinion of the court below	8
Conclusion	20
Appendix A—Opinion below	1a
Appendix B—Dissenting opinion below	6a

Appendix C—Judgment below 8a

Appendix D—Statutes 8a

Appendix E—Opinion of July 27, 1967 ..... 14a

Appendix F—Excerpt from Brief of Appellees 17a

Appendix G—Excerpt from Joint Appendix 18a

Cases Cited.

Akron & Barberton Belt R. Co., et al. v. Brotherhood of Railroad Trainmen, 252 F. Supp. at 207 .....9, 10

Brotherhood of Locomotive Firemen & Enginemen, et al. v. Baltimore & Ohio R. Co., et al., 372 U. S. 284 (1963) 4

Brotherhood of Locomotive Firemen and Enginemen v. Chicago Burlington & Quincy R. Co., 225 F. Supp. 11 (D. C. D. C. 1964), aff'd 331 F. 2d 1020 (D. C. Cir. 1964), cert. den. 337 U. S. 918 (1964) 3, 4, 15, 20

Brotherhood of Railroad Trainmen, et al. v. Akron & Barberton Belt R. Co., et al., Nos. 20,152 etc., decided May 12, 1967, Supp. July 31, 1967 .....9, 10

Brotherhood of Railroad Trainmen v. Certain Carriers, etc., 349 F. 2d 207, 210 (1965) 7, 9, 12

Brotherhood of Railroad Trainmen v. Chicago, Milwaukee, St. Paul & Pacific R. Co., 237 F. Supp. at 418 (D. D. C. 1964) 18

Brotherhood of Railroad Trainmen v. Chicago, Milwaukee, St. Paul and Pacific R. Co., et al., 248 F. Supp. 1008 (D. D. C. 1966) 8

Brotherhood of Railroad Trainmen v. Chicago, Milwaukee, St. P. & P. R. Co., 345 F. 2d 985 (1965)..7, 12

Brotherhood of Railroad Trainmen v. Missouri Pacific R. Co., 230 F. Supp. 197 (1964) 6, 11, 12, 17

Commissioner v. Sunnen, 333 U. S. 591 (1948), at 597-598 16

In Re Certain Carriers, etc., 231 F. Supp. 519 (D. D. C. 1964) 7, 9, 12, 13, 19
In Re Certain Carriers, etc., 248 F. Supp. 1008 (D. D. C. 1966) 13, 15

Statutes Cited.

Public Law 88-108, 77 Stat. 132, 45 U. S. C. 157 (1966 Supp.) 2, 3, 4, 6, 7, 11, 12, 13, 14, 15, 19
Railway Labor Act, 45 U. S. C., §§ 151 ff 2, 3, 5, 6, 7, 11, 12, 13, 14, 15, 19
28 U. S. C., § 1254 (1) 2

Miscellaneous.

41 Labor Arb. Reports 5

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CERTAIN CARRIERS REPRESENTED BY THE EASTERN, WESTERN & SOUTHEASTERN CARRIERS CONFERENCE COMMITTEES, THE MISSOURI PACIFIC RAILROAD COMPANY, NATCHEZ & SOUTHERN RAILWAY COMPANY, THE TEXAS & PACIFIC RAILWAY COMPANY, RALPH T. SEWARD, Chairman of Arbitration Board 282 and the UNITED STATES OF AMERICA, Intervenor,
Respondents.

PETITION

For a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

To the Honorable Earl Warren, Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States.

The Brotherhood of Railroad Trainmen respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit entered in this case on May 19, 1967, Court of Appeals Nos. 20,003 and 20,004.

OPINIONS BELOW.

The opinion of the District Court is reported at 248 F. Supp. 1008 (D. D. C. 1966), R. 150. The opinions of the Court of Appeals are not officially reported. They are unofficially reported at 65 LRRM 2367, and are appended hereto, the majority opinion as Appendix A, and the dissenting opinion as Appendix B. The opinions of the Court of Appeals in the companion case of *Brotherhood of Railroad Trainmen v. St. Louis Southwestern Railway Co.*, are not officially reported. They are unofficially reported at 65 LRRM 2365.

JURISDICTION.

The judgment of the Court of Appeals was dated and entered May 19, 1967. R. 182, Appendix C. The jurisdiction of this Court is invoked under 28 U. S. C., § 1254 (1). (Appendix D.)

QUESTIONS PRESENTED.

1. Whether that part of the railroad "work rules" arbitration, ordered by Congress in Public Law 88-108 and which was delegated by the arbitration board [No. 282] established by Congress in that Act to "special boards of adjustment", which were provided for in the Award of Arbitration Board No. 282, was required to be conducted by such special boards in accordance with the procedures and within the procedural restrictions prescribed by Congress for the conduct of the arbitration; i. e., whether such "special boards of adjustment" were required to conduct the arbitration delegated to them in accordance with the procedures of Sections 7 and 8 of the Railway Labor Act to the extent Board 282 was required to do so and whether the awards of the special boards were subject to Section 9 of the Railway Labor

Act to the extent the Award of Board 282 was subject thereto.

2. Whether the judgment in *Brotherhood of Locomotive Firemen and Enginemen v. Chicago, Burlington & Quincy R. Co.*, 225 F. Supp. 11 (D. C. D. C. 1964), *aff'd.* 331 F.2d 1020 (D. C. Cir. 1964), *cert. denied* 337 U. S. 918 (1964), prior to the establishment of any such "special boards of adjustment" or the commencement of any of their proceedings, and prior to any issue having arisen concerning what procedural requirements are applicable to such special boards, is *res judicata* of Question No. 1.

3. Whether a party aggrieved by the award of a special board of adjustment may complain of the failure of the board to conduct the arbitration as provided by Public Law 88-108 and Sections 7 and 8 of the Railway Labor Act, notwithstanding such party, believing the special board to be illegally constituted, did not participate in the proceedings of the board. (This question in this case does not arise in the petitions for certiorari filed this day by petitioner in other cases involving awards of special boards of adjustment.)

4. Whether the admitted failure of special boards of adjustment to comply with Section 4 of Public Law 88-108 and Sections 7 and 8 of the Railway Labor Act in conducting the arbitration delegated to them by the Award of Board 282 and the decisions of the Court below denying judicial review of the awards of special boards as provided by Section 4 of Public Law 88-108 and Section 9 of the Railway Labor Act deprive petitioner of contract rights without due process of law.

STATUTES INVOLVED.

The pertinent provisions of Public Law 88-108, 77 Stat. 132; 45 U. S. C. 157 (1966 Supp.), and the Railway Labor Act, 45 U. S. C., §§ 151 ff, are set forth in Appendix D, pp. 8a-13a.

STATEMENT.

This case is related to other cases in which petitions for writs of certiorari are being filed by petitioner. The other petitions relate to special boards on the St. Louis Southwestern R. Co. and Chicago, Milwaukee, St. Paul and Pacific R. Co. Another relates to the Terminal Railroad Association of St. Louis.

This case stems from Public Law 88-108, 77 Stat. 132, 45 U. S. C., § 157 (1966 Supp.), which was approved August 28, 1963 and was enacted to prevent the resort to "self-help" by the parties to a national railroad "work rules" dispute after this Court had determined in *Brotherhood of Locomotive Firemen & Enginemen, et al. v. Baltimore & Ohio R. Co., et al.*, 372 U. S. 284 (1963), that "self-help" was available to them. The act provided for the compulsory arbitration of two of several disputes, the "firemen on diesels"-issue and the "crew consist" dispute. It is the crew consist issue which is involved here, i. e., the number of employees required to be in road and yard service crews as distinguished from engine crews.

The Act provided for an arbitration board which has become known as "Arbitration Board 282". It made an award which, pursuant to the Act, was filed in the United States District Court for the District of Columbia and became effective on January 25, 1964. The constitutionality of the act and the validity of the award were upheld in *Brotherhood of Locomotive Firemen & Enginemen, et al. v. Chicago, Burlington & Quincy R. Co., et al.*, 225 F. Supp. 11 (D. D. C. 1964), *aff'd* 331 F. 2d 1020 (D. C. Cir. 1964), *cert. denied* 377 U. S. 918 (1964) (R. 10-11).

Section 3 of Public Law 88-108 provided that "[t]he arbitration board shall make a decision, pursuant to the procedures hereinafter set forth" as to the disposition to be made of those disputes and also provided in Section 4 that "[t]o the extent not inconsistent with this joint

resolution the arbitration shall be conducted pursuant to Sections 7 and 8 of the Railway Labor Act, the board's award shall be made and filed as provided in said sections and shall be subject to Section 9 of said Act" (App. D, p. 8a).

The Award made a "national rule" disposing of the "fireman issue" so that no further arbitration of that issue was necessary. However, as to the "crew consist issue", the Arbitration Board found that a national prescription of road and yard crew size would be wholly unrealistic, that the consist of crews necessary to assure safety and to prevent undue workloads was dependent upon a great complex of local factors and, therefore, should be determined by "special boards of adjustment" upon the basis of local conditions according to certain "guidelines" which were set forth in its Award (41 Lab. Arb. 693-694; R. 7-9).

Thus, Arbitration Board 282 itself made no change in the consist of any crew. Instead, it delegated its arbitral authority under the Act of Congress to special boards of adjustment and they conducted the arbitration of the dispute with which Congress was concerned.

The award provided a procedure for establishing special boards of adjustment but was silent as to the procedure to be followed by a special board in conducting the arbitration delegated to it (R. 6-7).

The awards of all four special boards here involved authorized reductions in the number of employees theretofore required to be in crews to the full extent proposed by the railroads and permitted by the Award of Board 282 (R. 72-103). Special boards convened on other railroads did likewise as is shown by the records in the cases in which a petition for a writ of certiorari is being filed concurrently herewith.

Admittedly the special boards here involved did not take evidence under oath or affirmation and did not make, certify or file a transcript of their proceedings and the evidence taken by them as provided for by Public Law 88-108 and Section 7 Third (f), (h) and Section 8 (k) of the Railway Labor Act in conducting the arbitration delegated to them (R. 19, 69-70).

When the railroads announced their intention of putting the special board awards into effect petitioner promptly instituted a proceeding challenging the validity of the awards on various grounds including the failure of the special boards to follow the procedures and to comply with the procedural restrictions imposed by Congress on the conduct of the arbitration and the denial to the Brotherhood and those it represents of due process by the special boards having proceeded as they did. Proceedings were first instituted in the United States District Court for the Eastern District of Missouri, in which is located the railroads' headquarters, the special board award not having been filed in any court or elsewhere (R. 19). *Brotherhood of Railroad Trainmen v. Missouri Pacific R. Co.*, 230 F. Supp. 197 (1964). (Pending on cross appeals and stipulation of the parties in the U. S. Ct. of App., 8th Cir., Docket Nos. 17724 and 17749.) That Court held (230 F. Supp. at 201) that since the authority of the special boards stemmed from Award 282, the determinations of the special boards must be deemed part of the arbitration submitted to Board 282 and that, therefore, judicial review of the awards of the special boards was limited to the United States District Court for the District of Columbia in accordance with Section 4 of Public Law 88-108 and Section 9 of the Railway Labor Act. It therefore dismissed the proceeding for lack of jurisdiction.

Thereupon, the Brotherhood instituted proceedings in the District of Columbia. The District Court held that

the special boards were not required to follow the procedures of Sections 7 and 8 of the Railway Labor Act and in effect that their awards were not subject to judicial review under Section 9. *In Re Certain Carriers, etc.*, 231 F. Supp. 519 (D. D. C. 1964). That decision was appealed to the United States Court of Appeals for the District of Columbia Circuit. While the appeal in that case was pending, the Court of Appeals decided *Brotherhood of Railroad Trainmen v. Chicago, Milwaukee, St. P. & P. R. Co.*, 345 F. 2d 985 (1965), in which it held that awards of special boards of adjustment under Award 282 were subject to a "meaningful review" by Board 282 initially and thereafter were subject to judicial review under Section 9 of the Railway Labor Act which had been incorporated by reference into Public Law 88-108. Thereafter, when the Court of Appeals first decided this case, it held that its decision in the *Milwaukee* case was determinative and that the question of the validity of the awards of the special boards of adjustment here involved was within the primary jurisdiction of Board 282. The Court remanded so the questions could be submitted to Board 282. *Brotherhood of Railroad Trainmen v. Certain Carriers, etc.*, 349 F. 2d 207, 210 (1965).

A number of questions were submitted to Board 282 including the question of whether the special boards of adjustment provided for in Award 282 were required to follow the procedures of Sections 7 and 8 of the Railway Labor Act as provided by Public Law 88-108. Board 282 issued an opinion stating that the special boards were not required to follow those procedures (R. 54, 57-64, 66-71).

Two actions were then instituted by petitioner in the United States District Court for the District of Columbia to review and set aside, on identical grounds, the awards of the special boards and the ruling by Arbitration Board

282. The United States intervened, the actions were consolidated and thereafter have proceeded as a single action (R. 46, 108, 117, 126-127, 130-133). The District Court held that the special boards were not governed by the procedures of Sections 7 and 8 of the Railway Labor Act nor were their awards subject to Section 9 as provided by Public Law 88-108.[1] *In Re Certain Carriers, etc. and Brotherhood of Railroad Trainmen v. Chicago, Milwaukee, St. Paul and Pacific R. Co., et al.*, 248 F. Supp. 1008 (D. D. C. 1966).

On appeal, a majority of the Court of Appeals did not pass on the applicability of Sections 7 and 8 of the Railway Labor Act. It held that the issue was *res judicata* because petitioner had not raised the issue in the initial action seeking to impeach the original Award of Board 282, before there were any special boards of adjustment under that Award and before the question of any procedural restrictions on the special boards had arisen (R. 10-11, 72, 82-83, 91-92, 100-102, App. G, p. 18a). It held also that the Brotherhood was precluded from raising any question of the procedural adequacy of the proceedings of the special boards by its having failed to participate in those proceedings. App. A, p. 1a.

Circuit Judge Wright dissented for the reasons set forth in his dissenting opinion in *Brotherhood of Railroad Trainmen v. St. Louis Southwestern Ry. Co.*, decided the same day, in which case a petition for a writ of certiorari is also being filed this day, in which case the Brotherhood did participate in and object to the proceedings of the special board there involved. In that dissent he considered that since Congress, conscious of the seriousness of its action in imposing compulsory arbitration, had provided

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[1] Section 9 provides for setting aside awards on limited grounds but including the ground that the proceedings were not in substantial conformity with the procedures required by Sections 7 and 8.

mandatory procedural due process safeguards for the arbitration, it was inconceivable that Board 282 could delegate its arbitral authority to local boards without such safeguards being applicable to the local boards. He considered the ruling of the majority concerning *res judicata* was inconsistent with the decision of that Court in *Brotherhood of Railroad Trainmen v. Certain Carriers, etc.*, 349 F. 2d 207 (1965), in which case the Court, two years earlier had, *sub silentio* rejected the *res judicata* argument and remanded the parties to further proceedings under Public Law 88-108 and thereafter Section 9 of the Railway Labor Act. App. B, p. 6a.

REASONS FOR GRANTING THE WRIT.

Considerable controversy has been generated over the nature and legal status of the special boards and the awards which they have made (R. 59). That "considerable controversy" is further attested by the litigation involving them.

While only four special boards are directly involved in this case and only one in each of *Brotherhood of Railroad Trainmen v. St. Louis, Southwestern R. Co.*, and *Brotherhood of Railroad Trainmen v. Chicago, Milwaukee, St. P. & P. R. Co.*, in which petitions for writs of certiorari are also being filed, the decision in this case may well affect many others. About two hundred railroads, together with petitioner and other unions representing operating employees were parties to Public Law 88-108 and the Award of Arbitration Board 282. *In Re Certain Carriers, etc.*, 231 F. Supp. at 520, *supra*. About ninety special boards made awards, as noted by the District Court in *Akron & Barberton Belt R. Co., et al. v. Brotherhood of Railroad Trainmen*, 252 F. Supp. at 209. More specifically it appears from a stipulation to which the court referred in that case and to which petitioner and respondent railroads were parties (App. G, p. 18a),

and, as is also shown by the record in this case, more than one special board was convened and made an award on a single railroad or railroad system so that the nature and legal status of some eighty-three special boards on about forty railroads or railroad systems employing thousands of men actually are involved (R. 72, 83, 92, 101).

Reductions in the number of employees in crews in road and yard service pursuant to special board awards necessarily resulted in a change in the daily working conditions of those thousands of railroad employees who work in those reduced crews and of those who were deprived of work as shown in *Brotherhood of Railroad Trainmen v. Terminal Railroad Association of St. Louis,* filed concurrently herewith.

The controversy over the nature and legal status of the special board awards has been aggravated by the decision of the United States District Court for the District of Columbia, now affirmed to the extent that it held that special board awards continue beyond the expiration of Public Law 88-108 and the Award of Arbitration Board 282 until changed in accordance with the provisions of the Railway Labor Act. *Akron & Barberton Belt R. Co., et al. v. Brotherhood of Railroad Trainmen et al., supra,* and *Brotherhood of Railroad Trainmen et al. v. Akron & Barberton Belt R. Co. et al.,* Nos. 20,152, etc., United States Court of Appeals for the District of Columbia Circuit, May 12, 1967 and July 31, 1967.

The controversy as to the nature and legal status of the special boards and their awards has been compounded by the confusion resulting from the vacillations and conflicting decisons of the courts which have considered the controversy, particularly those of the Court below.

The question of whether the contract rights of petitioner and the working conditions of the thousands of employees it represents may be changed by compulsory arbitration by tribunals purportedly acting under Public Law 88-108

without such tribunals complying with the due process procedural safeguards imposed by Congress in that Act, obviously, is a far reaching question of fundamental importance. The mistaken application by the majority below of the principle of *res judicata* does violence to that principle; it holds that the question of procedural requirements and limitations of the special boards is *res judicata* because not raised in an earlier proceeding, before there were any special boards and before any such procedural question had arisen, because petitioner should have foreseen that such question would arise. And the question of whether procedural due process limitations must be met in taking away contract rights, regardless of whether the possessor of those rights refuses, mistakenly perhaps, to participate in the proceedings, is likewise fundamental.

Unquestionably, if Board 282 itself had made the determinations made by the special boards, instead of delegating the arbitration to special boards, its action would be invalid if it did not comport with the procedural prescription of Public Law 88-108. And this would be so whether or not petitioner participated in the proceedings; the authority of Board 282 to do anything having been limited by how Congress, its creator, said it should act.

When petitioner first challenged awards of special boards on the grounds here involved the Court denied jurisdiction because it considered special board awards to be subject to initial review by Board 282 under the provisions of Section 4 of Public Law 88-108 and Sections 7 and 8 of the Railway Labor Act and thereafter by the United States District Court for the District of Columbia under Section 4 of Public Law 88-108 and Section 9 of the Railway Labor Act, the Award of Arbitration Board 282 having been filed in that court pursuant to Public Law 88-108. *Brotherhood of Railroad Trainmen v. Missouri Pacific R. Co. et al.*, 230 F. Supp. 197, 201 (1964) (Pending on cross appeals and stipulation of the parties in the U. S. Ct. of App., 8th Cir., Docket Nos. 17724 and 17749).

Immediately thereafter the United States District Court for the District of Columbia ruled that special boards were not required to comply with Sections 7 and 8 of the Railway Labor Act and their awards were not reviewable under Section 9 of the Railway Labor Act, notwithstanding the provisions of Section 4 of Public Law 88-108. *In Re Certain Carriers, etc.*, 231 F. Supp. 519 (D. D. C. 1964).

While petitioner's appeal from that decision was pending, the Court below decided *Brotherhood of Railroad Trainmen v. Chicago, Milwaukee, St. Paul & Pacific R. Co.*, 345 F. 2d 985 (1965) and ruled that special boards were subject to the same procedural limitations and the same judicial review as was Board 282 and its Award in addition to and after initial review by Board 282. This ruling was in accord with the opinion of the District Court in Missouri in *Brotherhood of Railroad Trainmen v. Missouri Pacific R. Co. et al., supra.*

Now, as hereinafter shown, the majority of the Court below holds that judicial review may never be had.

Shortly after the decision of the *Milwaukee* case this case was decided for the first time by the Court below and the Court ruled that the *Milwaukee* case was determinative and in accordance with it remanded the case so that the question could be submitted to Board 282 for initial review. *Brotherhood of Railroad Trainmen v. Certain Carriers, etc.*, 349 F. 2d 207 (1965).

Although the applicability of Sections 7, 8 and 9 of the Railway Labor Act under Public Law 88-108 and due process in the arbitration conducted by special boards are solely questions of law, petitioner sought review by Board 282 pursuant to those opinions and decisions of the court below (R. 54 ff).[1]

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[1] Previously, in May 1964, petitioner had sought a ruling by Board 282 whether the provisions of Sections 7, 8 and 9 of the

When the question was submitted to Board 282 in pursuance of the opinions of the Court below in the *Milwaukee* case and in this case, that Board ruled that special boards were not required to comply with Sections 7 and 8 of the Railway Labor Act in conducting the arbitration delegated to them (R. 57-64, 66-71).

Thereafter petitioner sought judicial review under the opinions of the Court below in the *Milwaukee* case and in this case when it was first before the Court below. The District Court sustained the special board awards and the rulings of Board 282, holding that none of the provisions of the Railway Labor Act were applicable to special boards. *In Re Certain Carriers, etc.*, 248 F. Supp. 1008 (D. D. C. 1966).

In the ensuing appeal the majority of the Court below now holds that the judicial review previously held to be available with respect to special board awards under Section 4 of Public Law 88-108 and Section 9 of the Railway Labor Act cannot be had because the question whether special boards were required by Public Law 88-108 to comply with the procedures provided by Sections 7 and 8 of the Railway Labor Act for conducting an arbitration has been *res judicata* since before the first decision of the Court of Appeals on the issues involved in this case—indeed, since before any special boards existed or convened or could have existed or convened (App. G, p. 18a)—even though the Court of Appeals in both earlier decisions had presented to it the carriers' argument of *res judicata* and *sub silentio* rejected it. App. B, p. 7a, n. 4.

As the dissenting judge below pointed out (Appendix B, p. 6a), the requirement that the arbitration be conducted

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Railway Labor Act were applicable to special boards. Board 282 refused to answer the question and referred the parties to the opinion of the District Court in *In Re Certain Carriers, etc.*, 231 F. Supp. 519, *supra*. App. F, p. 17a.

in accordance with the proceedures of Sections 7 and 8 of the Railway Labor Act was mandatory. This is in accord with the mandatory language of Section 4 of Public Law 88-108 that the arbitration thereunder "shall be conducted pursuant to Sections 7 and 8 of the Railway Labor Act", which also, mandatorily, provide that arbitration boards "shall" follow specified procedures. The mandatory nature of those procedures is further reinforced by the provisions of Section 9 Third of the Railway Labor Act. Although it affords very limited grounds for impeaching an arbitration award it does include, as one such ground, the ground that the proceedings were not in substantial conformity with the Railway Labor Act, i. e., Sections 7 and 8 and Section 9 Fourth provides that, if any part of an award is invalid on such ground, the entire award "shall" be set aside.

Arbitration Board 282 and its delegates, the special boards, had no authority to proceed to any determination without proceeding as directed by Congress. The authority to proceed was not enlarged by the absence of petitioner. Surely, if Board 282 in conducting the initial proceeding under Public Law 88-108 had proceeded other than as directed by Congress and petitioner had not participated in the proceedings but nevertheless had its rights determined, petitioner could still have sought impeachment of the award on the ground that it was arrived at unlawfully or without authority, and would not be precluded by not having participated in the proceedings before the Board. The rights of petitioner and the rights of those it represents can no more be taken away by the special boards without following the prescribed procedures simply because petitioner was absent. The view of the majority of the court below that petitioner may not complain of the failure of the special boards to proceed as required by Public Law 88-108 ignores the mandatory

language by that law and sections 7, 8 and 9 of the Railway Labor Act and is based, in part, on cases arising under the inapplicable Administrative Procedures Act such as *United States v. Tucker Truck Lines* (Appendix A, p. 4a, n. 7). Cf., *In Re Certain Carriers, etc.*, 225 F. Supp., *supra*, at 18.

Public Law 88-108 and the sections of the Railway Labor Act which it adopted for the conduct of the arbitration placed the duty of fulfilling the procedural requirements upon the arbitration board. The obligation of the board was not made to depend upon the presence or absence of one party to the proceeding.

The majority of the Court of Appeals appears to have considered petitioner's complaints concerning the conduct of the arbitration by the special boards as an attempt to relitigate the validity of the Award of Board 282. They are not. They have been and are based upon the premise that the Award of Board 282 is valid, as was determined in *Brotherhood of Locomotive Firemen & Enginemen, et al. v. Chicago, Burlington & Quincy R. Co., et al., supra*. No special boards had convened and none had made an award at that time. App. G, p. 18a.

The cause of action in this case is whether awards made by special boards in May, 1964, are valid and is based upon omissions by them occurring subsequent to the judgment in *Brotherhood of Locomotive Firemen & Enginemen, et al. v. Chicago, Burlington & Quincy R. Co., et al., supra*, and upon rulings by Arbitration Board 282 on October 10, 1965, sustaining those awards which appear at R. 46, 50, 54, 57-64, 66-71. It is not the same cause of action as was in *Brotherhood of Locomotive Firemen & Enginemen, et al. v. Chicago, Burlington & Quincy R. Co., et al., supra*. The majority of the Court below acknowl-

edged that the issue here was not an issue in that case (App. A, p. 3a, n. 5). The judgment entered February 28, 1964 in that case (R. 10) could not be *res judicata* of the issues in this action under a proper application of the doctrine of *res judicata*.

The following, from *Commissioner v. Sunnen*, 333 U. S. 591 (1948), at 597-598, is appropriate here:

> "It is first necessary to understand something of the recognized meaning and scope of *res judicata*, a doctrine judicial in origin. The general rule of *res judicata* applies to repetitious suits involving the same cause of action. . . .
>
> "But where the second action between the same parties is upon a different cause or demand, the principle of *res judicata* is applied much more narrowly. In this situation, the judgment in the prior action operates as an estoppel, not as to matters which might have been litigated and determined, but 'only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered' *Cromwell v. County of Sac, supra*, 353. And see *Russell v. Place*, 94 U. S. 606; *Southern Pacific R. Co. v. United States*, 168 U. S. 1, 48; *Mercoid Corp. v. Mid-Continent Co.*, 320 U. S. 661, 671. Since the cause of action involved in the second proceeding is not swallowed by the judgment in the prior suit, the parties are free to litigate points which were not at issue in the first proceeding, even though such points might have been tendered and decided at that time. . . ."

The misconception and misapplication of *res judicata* by the majority of the Court below undercuts and would preclude giving effect to the earlier opinion and decision

of a different panel of judges of the same Court in the *Milwaukee case, supra,* upon the basis of which the court felt "constrained" to remand so the questions could be submitted to Board 282 (349 F. 2d at 210) and although, as noted in the dissent below, the question of *res judicata* was before the court at that time. App. B, p. 7a, n. 4.

If the decision of the majority of the Court below is allowed to stand the special boards which have purportedly changed collective bargaining contracts and the working conditions of trainmen and other railroad employees will thereby have become a law unto themselves and answerable to no authority, by authority of Arbitration Board 282, Public Law 88-108 to the contrary notwithstanding.

Underlying the foregoing questions is also the question whether petitioner and the railroad employees it represents will have been deprived of contract rights and will have had their working conditions changed without due process of law if the special board awards and the rulings by Arbitration Board 282 and the courts below are allowed to stand.

Petitioner has contended from the beginning that, to permit special board awards to stand, when the special boards which made them did not comply with Section 4 of Public Law 88-108 and Sections 7, 8 and 9 of the Railway Labor Act, would deprive petitioner and the railroad employees it represents of rights without due process of law. *Brotherhood of Railroad Trainmen v. Missouri Pacific Railroad Company, et al.,* 230 F. Supp. 197 (D. C. Mo. 1964), *supra.*

In the *Milwaukee case, supra,* the court below, in 1965, considered "meaningful review" of special board's awards, initially by Board 282 and, thereafter, by the courts under Section 4 of Public Law 88-108 and Section

9 of the Railway Labor Act necessary to "ensure" that the delegated authority of special boards was exercised within prescribed standards, obviously, those "standards" being the procedures prescribed by Public Law 88-108 and Sections 7, 8 and 9 of the Railway Labor Act for conducting the arbitration and the "guidelines" established by the award of Board 282. 345 F. 2d at 987, notes 4 and 5. The district court, in the same case, per Robinson, J., now Circuit Judge, recognized that special board awards must withstand the test of the Fifth Amendment. *Brotherhood of Railroad Trainmen v. Chicago, Milwaukee, St. Paul & Pacific R. Co.*, 237 F. Supp. at 418 (D. D. C. 1964).

Arbitration Board 282 does not consider "due process" to require a special board to observe the procedural requirements of the Railway Labor Act which Public Law 88-108 prescribed for the conduct of the arbitration (R. 70).

Notwithstanding the dissent of Circuit Judge Wright in the court below on due process grounds (App. B, p. 6a), the majority of the Court below did not then deal with the question. Instead, the majority declared "[w]e will not consider the merits" of petitioner's claims that special boards of adjustment, like Arbitration Board 282, were required to operate pursuant to the Railway Labor Act and take all evidence under oath and keep a transcript of their proceedings (App. A, p. 3a).

However, on July 27, 1967, in a further consideration of the *Milwaukee case, supra,* the same majority of the court below declared that "we have previously upheld [Arbitration Board 282's] determination that due process was not violated by lack of a transcript". Further, the majority said of its opinion in this case "we similarily affirmed the board's decision that a 'meaningful review' had been provided" (App. E, p. 14a).

The failure of an arbitration board to take evidence under oath or affirmation or to keep a record of its proceedings, including a transcript of the evidence, are, per se, grounds for impeachment of its award under Section 9 of the Railway Labor Act which was adopted by Public Law 88-108. It is equally apparent that, in the absence of a transcript, mandatorily required by Section 4 of Public Law 88-108 and Sections 7, 8 and 9 of the Railway Labor Act, it is not possible, upon review, to determine whether evidence was taken under oath or affirmation or whether a party was accorded a fair hearing or whether the award was warranted by the evidence under the "guidelines" established by Board 282 (R. 7-11). Circuit Judge Wright also noted that fact in his dissent in the July 27, 1967 decision of the *Milwaukee Case* (Appendix E, p. 16a). Board 282 recognized the necessity for a transcript for such a review but ruled that a party seeking review had the duty to provide the transcript notwithstanding the mandatory provisions of Public Law 88-108 and Section 7 Third (h) of the Railway Labor Act, placing such duty on the Board and notwithstanding Section 7 Third (g) of the Railway Labor Act and of the award by Board 282 which provide for the expense of making a transcript to be "shared equally by the parties" (R. 7). Board 282, like some of the courts below, now considers those provisions of the Railway Labor Act not to be applicable to special boards but only to Board 282. R. 63, 64, 70-71, *In Re Certain Carriers, etc.*, 231 F. Supp. 519 at 521 (D. D. C. 1964), 248 F. Supp. 1008 at 1012 (D. D. C. 1966), *supra*.

Now, the majority of the court below would foreclose resolution of the question on a belated and misconceived application of *res judicata*.

Circuit Judge Wright, in his dissent, regards the mandatory procedural provisions of Sections 7 and 8 of the Railway Labor Act for evidence to be taken under oath or

affirmation and for a transcript to be made by the arbitration board to be "due process safeguards" required by Congress when, by Public Law 88-108, it took the unprecedented action of substituting compulsory arbitration for the right to strike. Judge Wright noted that in *Brotherhood of Locomotive Firemen & Enginemen v. Chicago, Burlington & Quincy R. Co., supra,* the court had approved Board 282's delegation of the arbitration required by Public Law 88-108 to special boards but said that "what this court did not approve was the delegation of the National Board's authority to the local boards without the due process safeguards required by the Act, i. e., Sections 7 and 8 of the Railway Labor Act." Continuing, Circuit Judge Wright said, "Appellees admit that the proceedings before the local boards in these cases have not been conducted pursuant to Sections 7 and 8 of the Railway Labor Act, and the union is here complaining of the local boards' failure so to proceed. Since Congress, in requiring the union to submit to compulsory arbitration, deemed the Sections 7 and 8 safeguards necessary for proceedings before the national Board, it is inconceivable to me that the national Board may legally delegate its authority to local boards without such safeguards" (App. B, p. 7a).

CONCLUSION.

Considering the unprecedented nature of the compulsory arbitration as a substitute for the right to strike; that the arbitration was not conducted by the board for which Congress provided, but by delegates of that board; the vascillating, conflicting and belated decisions of Arbitration Board 282 and of the courts below, the latest of which would, if sustained, foreclose a definitive determination of the validity of special board awards which purport to change contracts and affect the daily work of thousands of railroad employees, petitioner most sincerely and ear-

nestly urges this Court to resolve the questions as to the validity of special board awards and the Constitutional question.

Respectfully submitted,

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